No. 89-1506

Supreme Court, U.S.
FILED
JUN 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1989

JOSEPH M. GEDAN, et al.,

*Petitioners,*

v.

EARLE A. PARTINGTON, and HAWAII ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONERS' REPLY MEMORANDUM

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## PETITIONERS' REPLY MEMORANDUM

## I. SUMMARY OF ARGUMENT.

Respondent Earle A. Partington's Brief in Opposition proves why the sanctions ordered by the court of appeals against Petitioners here (the "State Officials") erode this Court's precedents, and otherwise merit review and reversal.

As the judgment below also conflicts with *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Cooter & Gell v. Hartmarx*.

In any case, the Petition in No. 89-1506 should be granted to correct the Ninth Circuit's departure, in its sanctions judgment, from principles of comity, equity, and restraint, and its improper invocation of Civil Rule 11 summarily to punish appellee-parties who seek their Rule 38 damages on appeal.

## II. ARGUMENT.

### A. Review Should Be Granted to Correct the Court of Appeals' Departure, in Punishing Petitioners' Request for Appellate Damages, from Settled Abstention and Constitutional Precepts.

Respondent labors long to establish a proposition we do not dispute: that "attorneys should be able to distinguish an appeal based on excellent arguments from a frivolous appeal" (Resp. Br. at 6; *see* Pet. at 21 (No. 89-1506)). Our first basis for reversal of the sanctions against us, however, is simply that, given the extraordinary burdens imposed on litigants, such as Respondent, who seek to enjoin ongoing state proceedings in this context, "a request for Rule 38 sanctions was at least arguable" (*id.* at 19). Seen clearly, the opposition brief does not address, let alone refute, this conclusion.

Contrary to this Court's recent decision in *Cooter & Gell v. Hartmarx*, 58 U.S.L.W. 4763 (U.S. June 11, 1990), Respondent, in large part simply invokes the law of the case below that the "arguments that *Middlesex* did not compel abstention were excellent" (Resp. Br. at 6 (citing 880 F.2d at 131)). As *Cooter & Gell* makes clear, this Court must be satisfied at the least that the court below did not rely "on a materially incorrect view of the relevant law in determining that [Petitioners'] pleading was not 'warranted by existing law or a good faith argument' for

changing the law." *Id.* at 4768; *see Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1987). Here, the Ninth Circuit's assessment of the "relevant law" clouded its view that our request for appellate damages itself warranted Rule 11 punishment. The judgment that Respondents' arguments for distinguishing *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) were indisputably nonfrivolous is wrong, and merits review and reversal.[1]

As demonstrated in our Petition, the principles that were necessary to the success of Partington's appeal below were not simply theories that the State Officials "believed" "would prevail" (Resp. Br. 4). Rather, Partington's appeal rested in material part on challenges to the procedural scheme under Hawaii Supreme Court Rule 13 that themselves depended on reading what are, at best, ambiguities in state law to generate conflict with Partington's claimed federal rights. Pet. at 17-19. Not only were many of the conflicts irrelevant to any exception to *Younger* abstention, the arguments on appeal both

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[1] Significantly, Partington impliedly recognizes that the State Officials' motion for Appellate Rule 38 damages would have been well founded if it had demonstrated that, irrespective of Partington's underlying claims, no close questions existed involving "exceptions to *Younger* abstention principles and the application of those principles in *Middlesex*" (Resp. Br. at 5); Partington also offers no reasoned argument that the Rule 38 motion below was ill-founded insofar as Partington invoked the very narrow exception for statutes that are " ' "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomever an effort might be made to apply [them]." ' " *See* Pet. 18 n.7 (citing 880 F.2d at 128 (citations omitted)).

contravened precepts this Court has concluded are "beyond debate," *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988), and, quite simply, sought to infect the case with "plain error," *Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

Well before *Frisby* and *DeBartolo* were decided, this Court reaffirmed these precepts of restraint in the *Younger* context in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14-15 (1987). Although *Pennzoil* provoked a number of concurrences, none of the concurring Justices found fault with the Court's requirement of "unambiguous" state procedural inhospitality as a pre-requisite to a federal injunction directed to state proceedings otherwise within *Younger*'s scope. 481 U.S. 1 at 19 (Brennan, J., joined by Marshall, J.); *id.* at 27 (Blackmun, J.); *id.* at 30 n.2 (Stevens, J.). Our request for appellate damages, in turn, rested in large measure on Respondent's total failure to address *Pennzoil*'s bar below. *See* Pet. at 15.

Respondent's own characterization of the asserted unarguably "excellent" grounds for appeal shows why the sanctions imposed below are wrong, and should be reversed. While Partington asserts that "close questions" were presented by his efforts to distinguish *Middlesex*, the issues he identifies (Resp. Br. at 5) depend on denigrating readings of state law that were foreclosed by controlling precedent, or, worse, on attacks on the integrity of judges that have been long condemned by the federal courts (*see id.* and *cf.* Pet. at 19-20 (citing cases)), or on elevation of federal interests " 'to a level that *Younger* squarely rejected more than fifteen years ago' " (Pet. at 15)).

Respondent implies that it was appropriate for the court below, in assessing the "relevant law," to ignore *Pennzoil* and the caselaw on which it relies, because

"*Pennzoil* presented 'an unusual fact situation' " "not involving any situation remotely similar to attorney disciplinary procedures" (Resp. Br. 6). But this sort of claim has been repeatedly rejected in other contexts, *see United States v. Stanley*, 483 U.S. 669, 680 (1987); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), and, indeed, misreads *Pennzoil*. There, despite the unprecedented judgment against Texaco, and enormous threatened harm, abstention was still required. Indeed, even if Respondent's argument were a reason why denial of the State Officials' motion for damages might be sustainable, it offers no reason why Petitioners here were properly punished for making that motion.

Petitioners, in seeking to recover their damages on appeal, properly relied on the notion that, when evaluating the frivolity of Partington's appeal, "a precedent of this Court must be followed by the lower federal courts." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). Respondent's brief makes clear that the Ninth Circuit's sanctions judgment ignored this teaching.

Contrary to Respondent's brief (Resp. Br. at 1-2), the sanctions judgment creates an anomalous privilege to file federal suits precisely where this Court has held federal interference with state proceedings to be improper. For this reason alone, the writ should be granted and the judgment reversed.

### B. Review Should Be Granted to Correct the Ninth Circuit's Expansive Invocation of Rule 11 in the Appellate Courts.

Respondent also offers no persuasive ground for denying review as to our claim that the Court of Appeals

improperly relied on its "adoption" of Rule 11 as authority for issuing sanctions in the appellate courts. *See* Pet. at i, 17, 21-23. Indeed, as *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990), dictates reversal of, or at least severely undercuts, the sanctions judgment, the reasons for granting certiorari are plain.[2]

As *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990), confirms, the judgment below is plainly wrong, as "[n]either the language of [Fed. R. Civ. P.] Rule 11 nor the Advisory Committee Note suggests that the Rule could

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[2] Respondent, on this front, intimates, but does not argue specifically, that Petitioners are disabled from raising this ground, which was fully presented in our Petition. The suggestion (Resp. Br. 7) is wrong. The court of appeals, in the context of a vigorous debate between the majority and concurring and dissenting judge, "passed upon" the issue of Rule 11's applicability to conduct wholly on appeal. *See* 880 F.2d at 134-35, 148, A34-35, 81-83; *see also* Pet. App. 239-56 (No. 89-1506) (further briefing ordered by the panel). Even under the rigorous standards for bringing federal error up for review from the state courts, the record here would permit review. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 217-24 (1983); *cf. First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314 n.8 (1987). Indeed, while Respondent suggests that the judgment below might be affirmed on other grounds (*See* Resp. Br. at 7-8), Respondents did not expressly rely on any ground other than Fed. R. Civ. P. 11 (*see* Pet. App. 192 (No. 89-1506)); nor is it shown how the distinct standards applicable to sanctions under Fed. R. App. P. 46, 28 U.S.C. § 1927, or the inherent power, are independently sustainable on the record below. *Compare Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980). Indeed, Respondent virtually concedes the State Officials did not act in subjective bad faith, and "believed their arguments would prevail" (Resp. Br. at 4). In this context, this Court will "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Medical Center*, 485 U.S. 80, 86 (1988).

require payment for any activities outside the context of district court proceedings." *Id.*, 58 U.S.L.W. 4763, 4769.

The Ninth Circuit's adoption of Rule 11 cannot be squared with this logic. Pet. at 22-23. The tautological invocation of the "whenever relevant" language of Circuit Rule 1-1 cannot sustain the practice of applying Rule 11 to conduct wholly on appeal, as this Court has concluded that Rule 11 is *not* "relevant" to appellate proceedings. Indeed, the import of *Cooter & Gell* is that the Ninth Circuit could not, even by explicit circuit rule, adopt Rule 11 for use in the appellate courts. *See* 58 U.S.L.W. at 4768 (Rule 11 was designed in light of the district court's particular competence to "marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"). Here, as in *Cooter & Gell*, "[t]he Federal Rules of Appellate Procedure [and other sanctions authority] place a natural limit on Rule 11's scope." 58 U.S.L.W. at 4769. The sanctions here exceeded that "limit."

### C. Review Should Be Granted to Correct the Court of Appeals' Departure from Settled Procedure in Awarding Sanctions.

Respondent's argument (Resp. Br. at 9-12) that Petitioners were afforded proper process before sanctions were awarded against them is untenable. Indeed, Respondent has no good answer to our claim that, "while properly concerned with the 'guarantee of fair procedure' in *state* court," "the Ninth Circuit paid little heed to this requirement in issuing its own sanctions against Petitioners" (Pet. 23).

Partington's claim that due process is lacking in the state courts (Resp. Br. at 11-12) has been addressed in our

Petition here (Pet. at 7-9, 13, 23-24), and in our papers in the related petition in No. 89-1531. For present purposes, it suffices to note that Partington's due process arguments make clear that the sanctions judgment below is wrong. Partington at least implies that summary process is inappropriate where a monetary sanction carriers with it reputational injuries, but seeks to avoid the impact of this logic by suggesting that Rule 11 sanctions have no such effect (*see* Resp. Br. at 11). This latter suggestion is, of course, incorrect. *See Cooter & Gell*, 58 U.S.L.W. at 4768 (finding is akin to finding of negligence). The claim that Petitioners were afforded due process is thus flawed.

Partington in the end does not dispute that sanctions "'may not be imposed upon a person who is not on notice of (a) the fact that sanctions are under consideration, [and] (b) the reasons why sanctions are under consideration,'" (Pet. at 24), or deny the existence of Circuit precedent that makes clear that a claim for affirmative relief made for the first time in a reply (or amicus) brief will not be considered. *See id* (citing *Northwest Acceptance Corp. v. Lynwood Equipment Inc.*, 841 F.2d 918, 924 (9th Cir. 1988)). Partington also does not dispute that Respondents made no motion for sanctions under Fed. R. App. P. 27, and that under Circuit Rule 39-1.6, it is improper to seek fees in a Reply or Amicus Brief. Nonetheless, Respondent asserts Petitioners ought to have moved to strike the requests that were so made, or for briefing (Resp. Br. at 10).

This novel understanding of Due Process is sufficiently at odds Due Process precepts to warrant correction, as we have sought (*see* Pet. at i, 24-25), under the supervisory power. Indeed, it is clear that litigants need

not anticipate, on pain losing a pre-deprivation hearing, changes in procedural law of the kind indulged here. *E.g.*, *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 679 (1930). While the courts of appeals might be "well versed in recognizing frivolous requests" (Resp. Br. at 12), our contentions why sanctions should not be entered against the State officials plainly presented "arguable issues" warranting notice of the procedural posture and an opportunity to present at least written argument before sanctions were entered. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544 (1985). The proceedings warrant review and reversal.[3]

## III. CONCLUSION

For the reasons above and in the Petition, the Court should grant the Petition in No. 89-1506 and summarily reverse that part of the judgment below (Part V thereof) imposing sanctions against the Petitioners, or set the case down for argument in this Court, and, thereon, reverse the sanctions. Because the Court of Appeals did not have the benefit of *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S.

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[3] Here, the Court need not even reach the Due Process question to reverse, as Fed. R. App. P. 27, which requires motions to be separately filed and so denominated, Fed. R. App. P. 28, which directs that a Reply Brief be directed "to the brief of the appellee," and Fed. R. App. P. 29, which requires that the court, in allowing an untimely amicus curiae brief, such as that allowed here, to "specify within what period an opposing party may answer," provide statutory grounds for reversal that would moot the substantial due process issues we have raised.

June 11, 1990), the Court may wish to grant the petition, vacate the judgment adverse to Petitioners, and remand for further consideration in light of *Cooter & Gell v. Hartmarx*, No. 89-275 (U.S. June 11, 1990).[4]

Respectfully submitted, June 20, 1990.

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[4] Such a disposition, *see O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1985), would have the beneficial impact of curing Petitioners' procedural ground for relief, particular since *Cooter & Gell* addresses both the substantive standards for evaluating a Rule 11 motion (see 58 U.S.L.W. at 4768) as well as the propriety of Rule 11's invocation in the courts of appeals (*id.* at 4769-70), which are both central to our remaining issues.